

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

ARVCO CAPITAL RESEARCH, LLC,
et al.,

Defendants.

3:12-cv-00221-MMD-WGC

ORDER

Before the court is the United States of America's (U.S.) Motion to Intervene and Stay Discovery. (Doc. # 41.)¹ The U.S. seeks to intervene in this case so that it may request an order staying discovery in this action until the conclusion of a criminal case pending in the Northern District of California involving similar allegations, *United States v. Alfred J. Villalobos and Federico Buenrostro, Jr. (aka Fred Buenrostro)*, CR 13-0169 CRB. (*Id.* at 1.) Plaintiff Securities and Exchange Commission (SEC) filed a joinder. (Doc. # 42.) Defendants ARVCO Capital Research, LLC, ARVCO Financial Ventures, LLC and Alfred J.R. Villalobos (collectively, Defendants) opposed the motion to stay discovery. (Doc. # 45.)² Defendant Federico R. Buenrostro did not file a response. The U.S. and SEC filed reply memoranda. (Docs. # 47, # 48,

¹Refers to the court's docket number. Unless otherwise noted, all page references are to the court's docketed page numbers and not the original page numbers assigned by the parties.

²Defendants filed a second document which appears to be a duplicate of their opposition to the motion to stay except it contains an errata to the declaration of Sheila Van Duyne Romero. (Doc. # 46.) The court notes that substantively, Defendants only oppose the motion to stay discovery, and not the motion to intervene. The court granted the U.S.' motion to intervene at the July 10, 2013 hearing (*see* minutes at Doc. # 51), and because the propriety of intervention for this limited purpose was not in dispute, this Order will focus on the U.S.' request to stay discovery.

1 and # 49.)³

2 The court held an expedited hearing on June 21, 2013. (*See* minutes at Doc. # 44.) At
3 that time, the court entered a preliminary stay of discovery pending further briefing. (*Id.*) The
4 court held another hearing on July 10, 2013. (*See* minutes at Doc. # 51.) After reviewing the
5 parties' briefs and hearing oral argument, the court granted the U.S.' motion to intervene for
6 the limited purpose of seeking a stay of discovery, and denied the U.S.' motion to stay discovery
7 pending conclusion of the criminal action. (*Id.*) The court issues the instant order to explain
8 the rationale for its determination relative to the U.S.' request to stay discovery in the civil
9 action pending resolution of the criminal proceeding.

10 **I. BACKGROUND**

11 **A. Factual and Procedural History**

12 **1. Complaint**

13 The SEC filed its complaint on April 23, 2012, alleging that in 2007 and 2008,
14 Defendants engaged in a scheme to defraud by fabricating and falsifying a series of investor
15 disclosure letters in connection with the investments of the California Public Employee's
16 Retirement System (CalPERS) managed by a private equity firm based in New York, Apollo
17 Global Management (Apollo). (Doc. # 1.) The SEC avers that Federico Buenrostro was
18 CalPERS' Chief Executive Officer from late 2002 through June 30, 2008. (*Id.* ¶ 10.) Alfred J.R.
19 Villalobos is alleged to be the founder, managing director, control person and key
20 representative for defendants ARVCO Capital Research, LLC and ARVCO Financial Ventures,
21 LLC. (*Id.* ¶ 11.) ARVCO Capital Research, LLC, acted as a placement agent for private equity
22 funds and other money managers seeking investments from public pension funds. (*Id.* ¶ 11.)
23 ARVCO Financial Ventures, LLC, was a broker-dealer alleged to have continued ARVCO Capital

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26 ³Doc. # 47 is the U.S.' reply in support of its request to intervene. Doc. # 48 is the U.S.' reply in support
27 of its request for a stay of discovery. Doc. # 49 is the SEC's reply in support of the U.S.' requests to intervene and
28 stay discovery.

1 Research, LLC's business when it ceased operations. (*Id.* ¶ 12.)⁴

2 The SEC contends that Villalobos served on the board of directors for CalPERS from
3 1992 through 1995, and became friends with other members of the board, including
4 Buenrostro. (*Id.* ¶ 13.) One of Villalobos' clients was New York-based private equity firm,
5 Apollo. (*Id.* ¶ 14.) In June 2007, the SEC claims that CalPERS invested directly in Apollo,
6 acquiring ten percent of its voting shares. (*Id.* ¶ 15.) Apollo then began to require signed
7 investor disclosure letters from investors from whom it raised money using the assistance of
8 a placement agent, such as ARVCO, before it would pay the placement agent. (*Id.* ¶ 16.)

9 According to the SEC, Apollo contracted with ARVCO to act as the placement agent to
10 assist Apollo in securing CalPERS' investments into a series of Apollo managed funds. (*Id.* at
11 ¶¶ 17-36.) Apollo required that ARVCO secure an investor disclosure letter from CalPERS
12 regarding each investment to acknowledge in writing that it was aware of the terms of ARVCO's
13 relationship with Apollo. (*Id.*) The investment disclosure letter included a recitation of the
14 placement fee ARVCO would receive. (*Id.* ¶ 36.) The SEC alleges that when CalPERS' senior
15 investment portfolio manager refused to sign the investor disclosure letter upon advice of
16 counsel, Villalobos and Buenrostro conspired to create and transmit a series of false and
17 misleading investor disclosure letters to memorialize CalPERS' purported acknowledgment of
18 the terms of ARVCO's relationship with Apollo in connection with each investment fund. (*Id.*
19 at 17-36.) The SEC avers that upon receipt of the fabricated disclosure letter, Apollo paid
20 ARVCO millions of dollars in placement fees. (*Id.*)

21 **2. Discovery**

22 On October 10, 2012, the court approved the parties' stipulated discovery plan and
23 scheduling order, outlining three phases of discovery⁵; however, phase three, which includes

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25 ⁴ARVCO Capital Research, LLC and ARVCO Financial Ventures, LLC will be collectively referred to as ARVCO.

26 ⁵Phase 1 consisted of only written discovery and was to be completed on December 21, 2012; Phase 2
27 consisted of both written discovery and fact witness depositions and was to be completed on April 19, 2013; Phase
28 3 consists of all types of discovery, including expert witness discovery, and is to be completed by August 16, 2013.

1 expert witness discovery as well as other types of discovery, was extended, to be completed on
2 August 16, 2013. (*See* Docs. # 30, # 31.) At the time the extension was approved, the court
3 advised the parties that no additional extensions of time would be granted. (*See* Doc. # 30.)

4 3. Criminal Proceeding

5 On March 14, 2013, a grand jury in the Northern District of California returned a multi-
6 count indictment against Villalobos and Buenrostro. (*See* Doc. # 41 at 6.) Villalobos and
7 Buenrostro were both charged with crimes that are factually similar to the civil claims alleged
8 in this action. (*Id.* at 18-30.) Both men were arraigned on March 18, 2013, and pled not guilty
9 to all charges. (*Id.* at 6.) The most recent court appearance took place on May 8, 2013, and the
10 next appearance is scheduled for July 31, 2013. (*Id.*) At that time, it is anticipated that the court
11 will set further deadlines including, potentially, a trial date. (*Id.*)

12 4. Motion to Intervene and Stay Discovery

13 On June 20, 2013, the U.S. filed the instant motion seeking an order from the court
14 permitting it to intervene so that it could request an order staying discovery until the
15 conclusion of the criminal proceeding. (Doc. # 41.) As stated above, the court held an initial
16 expedited hearing where it entered a temporary stay of discovery pending completion of
17 briefing on the motion.⁶ The court then held a second hearing on July 10, 2013, where it
18 granted the U.S.' motion to intervene for the limited purpose of seeking a stay of discovery, and
19 then denied the U.S.' motion to stay discovery. (*See* minutes at Doc. # 51.)⁷ The court issues
20 this written Order to set forth the reasons for its determination.

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24 ⁶At the initial hearing on June 21, 2013, the parties disclosed that they, without seeking court
25 authorization, extended certain discovery deadlines. (*See* minutes at Doc. # 44.)

26 ⁷At the July 10, 2013 hearing, the court also ordered the SEC to serve its expert disclosures, sealed, no
27 later than Friday, July 12, 2013, which are to remain sealed pending resolution of any objection filed with respect
28 to the court's determination on the U.S.' motion to stay civil discovery. (*See* minutes at Doc. # 51.)

B. Summary of Argument

1. U.S.' Motion (Doc. # 41)

The basic contention articulated by the U.S. is that a stay of discovery in the civil action will prevent the Defendants from gaining unfair access to discovery beyond what is allowed by the criminal discovery rules. (Doc. # 41 at 5, 10-12.) For example, the U.S. argues that Defendants would be permitted to depose witnesses before trial, which is not permitted under the rules of criminal procedure. (*Id.* at 10-12.) In addition, the U.S. contends that broad disclosure permitted by civil rules result in a risk of perjury and manufactured evidence in the criminal prosecution. (*Id.* at 12.) The U.S. claims that staying discovery will avoid witness intimidation and unfair surprise because government witnesses would not be disclosed and/or deposed in advance. (*Id.*) Finally, the U.S. maintains that a stay of discovery pending conclusion of the criminal case will preclude either of the individual defendants from asserting their Fifth Amendment right against self-incrimination in the civil case which would result in one-sided discovery, putting the SEC at an unfair disadvantage in the civil case and similarly disadvantaging the U.S. in the criminal action. (*Id.*)

Next, relying on *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995), the U.S. argues that the factors outlined by the Ninth Circuit weigh in favor of staying discovery pending conclusion of the criminal case. (Doc. # 41 at 13-16.) First, the U.S. claims that the SEC will not be prejudiced by staying civil discovery because in the absence of a stay, if either of the defendants invoke their Fifth Amendment right against self-incrimination, the SEC will be forced to proceed with discovery in a one-sided fashion—with Defendants gaining an unfair glimpse of the SEC's case through discovery while the SEC does not get reciprocal responses to discovery. (*Id.* at 13.)

Second, the U.S. contends that staying discovery would not impose a burden on Defendants because at the conclusion of the criminal case they will have had access to complete testimony from every witness called by the prosecution along with all evidence presented, and can then conduct further discovery in the civil case if they deem necessary. (*Id.*) In addition,

1 they claim that if a stay is entered, Defendants will not have to choose between defending
2 themselves in the civil action and against a parallel criminal prosecution. (*Id.*)

3 Third, the U.S. argues that a stay of discovery in the civil action is in the interest of
4 judicial economy because it will streamline issues. (*Id.* at 14.) In addition, a conviction of one
5 or both Defendants in the criminal action could lead to a settlement of this action. (*Id.*)

6 Fourth, the U.S. maintains that a stay will benefit non-parties because it will save
7 witnesses time as well as the cost of appearing for two proceedings. (*Id.* at 14-15.) Further, the
8 U.S. asserts that a stay will benefit the U.S., which is a non-party to the civil action, because it
9 will ensure the U.S. can protect the integrity of the criminal justice system. (*Id.*)

10 Finally, the U.S. contends that the public's interest in a fair criminal justice system will
11 be harmed if Defendants gain an unfair advantage in the criminal case. (*Id.* at 16.)

12 **2. Defendants' Opposition (Doc. # 45)**

13 Preliminarily, Defendants oppose the motion on the grounds that the investigation and
14 litigation in this and related matters⁸ against these Defendants and concerning the allegations
15 pertaining to the investor disclosure letters has been incessant and extensive. (Doc. # 45 at 4-
16 7.) In this regard, Defendants make the following points: (1) both Villalobos and Buenrostro
17 have testified under oath in other related proceedings, providing a detailed account of their
18 involvement with the investment disclosure letters; (2) Villalobos has represented to the SEC
19 that even after being indicted he would not invoke his right against self-incrimination under
20 the Fifth Amendment in this civil action; (3) the SEC had scheduled Villalobos' deposition on
21 an expedited basis as a result of his ailing health, but inexplicably canceled the deposition, and
22 now Defendants have noticed it in order to preserve his testimony in this action; (4) while
23 Buenrostro may elect to assert his Fifth Amendment right against self-incrimination in this
24 matter, he has already testified under oath regarding his involvement with the investment
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26 ⁸The parties make reference to the SEC's investigation and litigation, a bankruptcy proceeding involving
27 Villalobos and ARVCO, an action instituted by the California Attorney General and attendant investigation, as well
28 as the criminal investigation and litigation that spurred the U.S. to bring this motion.

1 disclosure letters, and has not indicated an opposition to continuing discovery in this matter;
2 (5) Defendants have already produced their expert report pursuant to the discovery plan and
3 scheduling order while the SEC has not⁹; (6) as part of its initial disclosures in this action, the
4 SEC produced hundreds of thousands of pages of documents and thousands of pages of sworn
5 testimony from witnesses, including ARVCO employees and Defendants; (7) in other related
6 proceedings where Villalobos and Buenrostro have testified, there have been an additional
7 thirty to forty depositions; (8) Defendants do not intend to conduct a significant amount of
8 further discovery in this action; the key depositions of employees at Apollo have already been
9 taken; they will take a few more key percipient witness depositions and the deposition of
10 Villalobos; and as indicated above, they have already disclosed their single expert witness;
11 (9) Villalobos is in ailing health and would like to proceed with this litigation in an expeditious
12 manner; and (10) the criminal action is not yet set for trial. (Doc. # 45 at 4-7.)

13 Next, Defendants argue that the U.S. faces a high burden in demonstrating that
14 discovery should be stayed pending conclusion of the criminal proceeding. (*Id.* at 8-9.) They
15 contend that their Fifth Amendment rights are not implicated, and agree that the
16 *Keating* factors are controlling, asserting that each of the factors weighs against the entry of
17 a stay. (*Id.* at 9-15.)

18 Concerning the implication on their Fifth Amendment rights, Defendants assert this
19 issue is negligible in this case because Villalobos and Buenrostro have already testified under
20 oath regarding the investor disclosure letters. (*Id.* at 10-11.)

21 Turning to the *Keating* factors, Defendants first argue that neither the U.S. nor the SEC
22 will be unfairly prejudiced if discovery is allowed to proceed because of the amount of evidence
23 they have already gathered. (*Id.* at 11-12.) Moreover, the fact that the indictment has already
24 been issued in the criminal case militates against any finding of prejudice to the U.S. or SEC.
25 (*Id.*) Defendants claim that the U.S. has not pointed out exactly what evidence it anticipates

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27 ⁹While Defendants have served their expert report, the SEC has not opened the document pending
28 resolution of the U.S.' motion.

1 remains to be discovered with respect to these allegations, and conclusory assertions of
2 prejudice are insufficient to carry the U.S.' burden. (*Id.* at 12.)

3 Second, Defendants contend that they will be prejudiced by a stay of discovery in this
4 matter because it will preclude Defendants from resolving this matter expeditiously. (*Id.* at 13;
5 Doc. # 45-2 (Villalobos Decl.))

6 Third, Defendants claim that the interests of judicial economy weigh against entering
7 a stay because it would indefinitely postpone the conclusion of this action. (*Id.* at 14.)

8 Finally, Defendants maintain that third parties and the public have an interest in the
9 efficient resolution of this action. (*Id.*) For example, the Defendants are simultaneously
10 involved in a bankruptcy proceeding, and a delay of this litigation will impede efforts of the
11 trustee in the bankruptcy action to maximize the recovery of assets for the benefit of creditors.
12 (*Id.*; Doc. # 45-3 (Hartman Decl.))

13 **3. U.S.' Reply (Doc. # 48)**

14 The U.S. argues that Ninth Circuit authority clearly favors a stay. (Doc. # 48 at 1-6.) The
15 U.S. contends that if discovery continues in this case, Buenrostro may invoke his Fifth
16 Amendment right against self-incrimination, and while Villalobos has indicated he will waive
17 his Fifth Amendment right in this action, he could choose to invoke it with respect to particular
18 questions raised at his deposition, precluding the SEC from obtaining information in discovery
19 while Defendants are permitted to conduct unfettered discovery. (*Id.* at 7, 9-10.) Next, the U.S.
20 highlights its concerns that if discovery is allowed to proceed in the civil case, Defendants may
21 improperly utilize the discovery process to depose witnesses in the criminal case and gain
22 access to evidence which they would not otherwise have access to in the criminal case, which
23 may lead to perjury, witness intimidation and manufactured evidence. (*Id.*) The U.S. then
24 asserts that the fact that an indictment has already issued makes a stay *more* appropriate
25 because discovery issues are no longer speculative. (*Id.* at 7-8.) Finally, the U.S. reiterates the
26 arguments made in its moving papers that the remaining *Keating* factors favor a stay. (*Id.* at
27 10-11.)

(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Id. at 324-25 (citing *Molinaro*, 889 F.2d at 903).

Defendants contend that the moving party is faced with the “high” burden of demonstrating that a stay should be entered pending resolution of a criminal proceeding. (Doc. # 45 at 7-8, citing *Doe v. Sipper*, 869 F.Supp.2d 113, 116 (D.C. Cir. 2012); *Microfinancial, Inc. v. Premier Holidays Intern.*, 385 F.3d 72, 77 (1st Cir. 2004); *Alcala v. Texas Webb County*, 625 F.Supp.2d 391, 397 (S.D. Tex. 2009); *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2nd Cir. 2012); *Weil v. Markowitz*, 829 F.2d 166, 174 n. 17 D.C. Cir. 1987)).

While Defendants cite no applicable Ninth Circuit authority, the court does not disagree that the moving party should be tasked with demonstrating that the factors announced in *Keating* weigh in favor of entering a stay pending resolution of a criminal proceeding. The court declines to categorize this burden as “high” as Defendants suggest; rather, the court simply concludes that the Ninth Circuit requires a moving party to demonstrate that a stay is in the “interests of justice” based on an application and evaluation of the *Keating* factors to the circumstances present in a particular case. *See Keating*, 45 F.3d 322; *see also Molinaro*, 889 F.2d 899.

B. Analysis

1. Implication on Fifth Amendment Right Against Self-Incrimination

Regarding the extent to which the Defendants’ Fifth Amendment right against self-incrimination would be implicated, preliminarily, the Ninth Circuit has stated that “[a] defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.” *Keating*, 45 F.3d at 326. The Ninth Circuit has further found that “[n]ot only is it *permissible* to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment

1 privilege, but it is even permissible for the trier of fact to draw adverse inferences from the
2 invocation of the Fifth Amendment in a civil proceeding.” *Id.* (citing *Baxter v. Palmigiano*, 425
3 U.S. 308 (1976)). Thus, while “the extent to which the defendant’s Fifth Amendment rights are
4 implicated is a significant factor [in deciding whether to stay a civil proceeding], [] it is only
5 one consideration to be weighed against others.” *Id.* (citing *Molinaro*, 889 F.2d at 902).

6 Here, the U.S. and SEC repeatedly argue that allowing discovery in this civil action to
7 proceed simultaneously with the criminal action will adversely impact the Defendants’ Fifth
8 Amendment rights because they will have to choose between testifying in this action or
9 asserting their Fifth Amendment right against self-incrimination to defend against the criminal
10 prosecution. The U.S. and SEC further assert that if Defendants exercise their Fifth
11 Amendment rights in this action, it will create an unfair advantage for Defendants because they
12 will be permitted to proceed in a one-sided manner with discovery in this action—they will be
13 able to conduct unfettered discovery while the SEC will be limited in the responses it receives.

14 The court finds the argument asserted by the U.S. and SEC to be unavailing. First, the
15 Ninth Circuit has expressly stated that it is completely permissible to conduct these
16 proceedings simultaneously, even if it means that one of the defendants will be forced to choose
17 whether or not to invoke the Fifth Amendment in this action. *See Keating*, 45 F.3d at 326
18 (citation omitted). Next, Villalobos has made it abundantly clear that he is waiving his Fifth
19 Amendment right against self-incrimination in this civil action. While the SEC claims that
20 Buenrostro will invoke the Fifth Amendment and refuse to testify in this action, neither the
21 U.S. nor the SEC sufficiently address the fact that Buenrostro has apparently already given
22 testimony under oath in related actions concerning the allegations relative to the investor
23 disclosure statements that are at issue in this litigation. While the SEC asserts that it was not
24 a *party* to those related actions and therefore did not conduct discovery in those actions, it does
25 not assert that it has not been able or will not be able to gain access to that testimony. In light
26 of these facts, the court cannot conclude that the absence of a stay will significantly implicate
27 Defendants’ Fifth Amendment rights.

1 Finally, the implication on Defendants' Fifth Amendment rights is only one of various
2 factors the court must take into account in determining whether to stay discovery in this action
3 pending resolution of the criminal proceeding. *See Keating*, 45 F.3d at 326 (citation omitted).
4 As the court will discuss in detail below, the court finds that a balancing of all the factors,
5 including this one, weighs against the entry of a stay of discovery in the civil action.

6 **2. Keating Factors**

7 **i. Potential Prejudice to the SEC**

8 The court concludes the SEC will not suffer prejudice in the absence of a stay.

9 The argument that the SEC will suffer prejudice is predicated on the assertion that its
10 discovery process will be disrupted in this action if one or both individual defendants choose
11 to invoke their Fifth Amendment right against self-incrimination because the SEC will then be
12 forced to engage in a unilateral discovery process in this action. (*See* Doc. # 41 at 10:8-15.) The
13 U.S. implies that if one of the defendants invokes the Fifth Amendment privilege against self-
14 incrimination in this case, the SEC will have produced a multitude of documents and witness
15 testimony while being denied reciprocal discovery from the Defendants. (*Id.*)

16 As mentioned above, Villalobos has represented that he will waive his Fifth Amendment
17 right against self-incrimination in this civil action. While defendant Buenrostro may still elect
18 to invoke the Fifth Amendment in this action, the U.S. and SEC have not responded to the fact
19 that Buenrostro has apparently already given testimony under oath in related proceedings on
20 the issues that are the subject of this lawsuit—the investor disclosure statements. While it may
21 not have been a party to those related proceedings, there is no indication that the SEC does not
22 have or cannot gain access to this testimony. Thus, the court cannot conclude that the SEC will
23 suffer prejudice in the absence of a stay because a defendant may invoke his rights under the
24 Fifth Amendment.

25 Moreover, the argument asserted by the U.S. and SEC ignores the fact that discovery in
26 this action was supposed to have been completed by August 16, 2013. As indicated in the
27 procedural history section of this Order, discovery was originally supposed to be completed by
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1 July 18, 2013, but the court extended this deadline to August 16, 2013, with the proviso that
2 there would be *no further extensions*. (Docs. # 30, # 31.) Additionally, the indictment in the
3 criminal proceeding issued in March of 2013, and the arraignment was held that same month.
4 Yet the U.S. waited until June 20, 2013, to file its motion to intervene and seek an order staying
5 discovery.

6 The stipulated discovery plan and scheduling order provides for discovery in phases,
7 and while this last phase apparently contemplates discovery other than expert witness
8 discovery, it is clear that written discovery and fact witness depositions should have been
9 completed by April 19, 2013—months before the U.S. sought to intervene and request a stay of
10 discovery.¹⁰ Therefore, the court cannot accept the argument that the SEC will be prejudiced
11 because one of the defendants may invoke their Fifth Amendment right against self-
12 incrimination at this late juncture in this case. The SEC should have completed fact witness
13 depositions in this matter, including those of Villalobos and Buenrostro, if it so desired, by
14 April 19, 2013. While the parties may have informally agreed to an extension of this deadline,
15 this extension was *not* authorized by the court as the court certainly would not have endorsed
16 an indefinite extension of the fact witness discovery deadline.

17 The U.S. also predicates its argument that the SEC will suffer prejudice in the absence
18 of a stay on the fact that the SEC has joined in the U.S.' motion, and therefore, the arguments
19 that the U.S. will suffer prejudice in the absence of a stay apply equally to the SEC. The U.S.'
20 argument of prejudice based in large part on the assertion that allowing discovery to continue
21 in this action while the criminal proceeding is pending will allow the Defendants to access
22 documents and witnesses that they would not otherwise have access to under the criminal
23 discovery rules.

24 Again, this argument ignores the fact that discovery in this case should have been
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26 ¹⁰The phased discovery plan and scheduling order is an anomaly because the first two phases provide for
27 clear deadlines for written discovery and fact witness depositions, but the third phase, which provides a
28 completion date for expert discovery also appears to contemplate other types of discovery.

1 completed by August 16, 2013, and written discovery and fact witness depositions should have
2 been completed before the U.S. sought to intervene and request a stay. Moreover, the U.S. has
3 not adequately addressed Defendants' contention that the investigation and litigation
4 concerning these allegations has been going on, in various related proceedings, for years, and
5 these proceedings have generated not only voluminous documentary evidence but witness
6 testimony taken under oath, including that of Villalobos and Buenrostro. While the U.S. makes
7 general conclusions about the potential for witness intimidation and perjured testimony in the
8 criminal action, it provides no specific details about what discovery it anticipates remains to
9 be taken in this action that would make these theoretical concerns a potential reality in this
10 case. Defendants, on the other hand, assert that they intend to conduct very little discovery in
11 this case in the time remaining to complete discovery. They intend to only take a few remaining
12 percipient witness depositions, along with the deposition of Villalobos, and have already
13 designated their single, jointly-retained expert witness. Under these circumstances, the court
14 cannot find the SEC or U.S. will suffer prejudice if civil discovery is allowed to proceed.

15 The court concludes that the SEC has not sufficiently demonstrated it will suffer
16 prejudice in the absence of a stay; therefore, this factor weighs against entering a stay of
17 discovery in this action pending resolution of the criminal proceeding.

18 **ii. Burden on Defendants**

19 The court cannot conclude that Defendants will be burdened in the absence of a stay.

20 The U.S. argues that the strongest reason for staying civil discovery pending resolution
21 of a criminal case is when a party to a civil case is also under indictment in a criminal case and
22 is forced to choose between defending their actions in the civil case and denying criminal
23 conduct in the parallel criminal proceeding. (Doc. # 41 at 14.)

24 Defendants, on the other hand, assert that they will not be burdened in the absence of
25 a stay. Villalobos asserts that he would actually be burdened if a stay is entered in this action
26 because it would simply prolong this matter and preclude him from defending himself and
27 pursuing a resolution of the civil claims against him.

1 The court finds persuasive Villalobos' assertion that a stay would in fact burden him
2 because it would merely serve to prolong this action further. The court is mindful of the
3 mandate of Rule 1 of the Federal Rules of Civil Procedure which provides that the rules, which
4 include the rules governing civil discovery, "should be construed and administered to secure
5 the *just, speedy, and inexpensive determination of every action and proceeding*." Fed. R. Civ.
6 P. 1. Given the fact that no trial date has been set in the criminal matter, and that discovery in
7 this action should be completed on August 16, 2013, the court agrees that a delay in resolution
8 of this action would actually burden Defendants.

9 In assessing this factor, the court must also consider whether continuing the civil
10 proceeding would unduly burden the Defendants' ability to assert their Fifth Amendment
11 rights. Once again, Villalobos has represented that he will waive his Fifth Amendment rights
12 in this action, and given that Buenrostro has already made statements under oath related to
13 these allegations in other proceedings, the court cannot conclude that continuing with this
14 action will adversely impact his ability to assert his rights.

15 In sum, the court finds that this factor weighs against entering a stay of civil discovery
16 pending resolution of the criminal proceeding.

17 **iii. Convenience of the Court and Efficient Use of Judicial Resources**

18 The court should generally avoid undue delays in proceedings. *See, e.g.*, Fed. R. Civ. P.
19 1. Therefore, the expeditious resolution of this matter is preferable for the court's docket. The
20 procedural posture of this matter provides an additional for reason for denying a stay of civil
21 discovery. As discussed previously, the parties entered into a stipulated discovery plan and
22 scheduling order in October of 2012, with the last phase of discovery originally to be completed
23 by July 18, 2013, and then extended to August 16, 2013. (Doc. # 31.) When the court agreed to
24 extend the discovery completion date to August 16, 2013, it advised the parties that there would
25 be no further extensions. (Doc. # 30.) Nevertheless, the SEC now joins in a motion that seeks
26 to extend the discovery completion deadline until thirty days after the criminal proceeding is
27 resolved. A trial date has not even been set in the criminal proceeding. Moreover, the U.S. and
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1 the SEC do not address what happens to discovery in this case in the event there is a delay in
2 the trial of the criminal proceeding or if an appeal is taken in the criminal proceeding. Nor do
3 they address what effect the entry of a stay on civil discovery will have on calendaring and
4 scheduling in this case in general.

5 The court recognizes that other courts have concluded that a stay in a parallel civil
6 proceeding that is in its early stages may prove more efficient in the long-run because a
7 criminal action may streamline discovery for the civil proceeding. In this case, however,
8 between discovery conducted in this action and the government investigations and discovery
9 taken in related actions, the amount of testimony and documentary evidence exchanged
10 between the parties is quite substantial. Moreover, the parties stipulated to a discovery
11 completion date of August 16, 2013; therefore, the parties have had ample time to conduct
12 discovery in this action. Thus, the court concludes that this factor weighs against the entry of
13 a stay.

14 **iv. Interests of Third Parties**

15 The court finds that the interests of third parties, including third-party witnesses, weigh
16 against a stay of civil discovery. The court is unpersuaded by the U.S.' argument that third-
17 party witnesses would save time, effort and money if they have to participate in parallel
18 proceedings. In consideration of the fact that the SEC is among the parties who have conducted
19 investigations and/or has already taken testimony of third-party witnesses related to the
20 allegations that are the subject of the civil case, the court cannot conclude that a stay of civil
21 discovery would significantly lighten the burden of third parties to participate in this
22 proceeding. When considered in connection with the provision in the stipulated discovery plan
23 and scheduling order that fact witness depositions should have been completed in April of
24 2013, before the U.S. sought to intervene to stay discovery in this matter, the court finds this
25 argument particularly unavailing. Therefore, the court concludes that this factor weighs against
26 entering a stay of civil discovery pending resolution of the criminal proceeding.

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1 **v. Public Interest**

2 Finally, while the court acknowledges the importance of the public interest argument
3 asserted by the U.S. and SEC that criminal defendants should not be able to gain an unfair
4 advantage in a criminal prosecution by utilizing civil discovery or otherwise circumventing the
5 rules applicable to criminal proceedings, the U.S. and SEC have not demonstrated this is a
6 likelihood in this case. A significant portion of discovery in this case has been or should have
7 already been completed. Defendants indicate they have only limited discovery remaining to
8 complete and have already disclosed their single, jointly-retained expert. Moreover, significant
9 investigations and discovery have occurred relative to these allegations in related proceedings,
10 including bankruptcy proceedings and an action by the California Attorney General. These
11 proceedings have resulted in the production of voluminous documents related to this action
12 as well as the testimony of various witnesses, including the Defendants. The U.S. and SEC do
13 not contend that they do not have or cannot obtain access to the materials unearthed in these
14 related proceedings. With these facts in mind, it is unlikely that Defendants will be able to
15 conduct further discovery in this action that would allow them to gain an unfair advantage in
16 the criminal prosecution. As a result, the court concludes that the public interest factor weighs
17 against entering a stay of civil discovery in this action.

18 In sum, the court finds that the implication on Defendants' Fifth Amendment rights as
19 well as the other *Keating* factors militate against a stay of civil discovery.

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III. CONCLUSION

The U.S.' motion to stay discovery pending resolution of the criminal proceeding is **DENIED**; however, discovery will remain stayed pending resolution of any objections to this order by District Judge Miranda M. Du. To that end, any objection to this order must filed on or before **August 2, 2013**. Any response to an objection must be filed no later than **ten days after the filing of the objection**. In the event an objection to this order is **not** filed by August 2, 2013, the stay on discovery will be considered lifted as of August 3, 2013, and the court will set a further status conference.

IT IS SO ORDERED.

DATED: July 16, 2013.



WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE